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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-134

JAY LEE GIBSON, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the United States for the Fifth Circuit

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To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Honorable Court of Appeals of the United States for the Fifth Circuit. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Honorable Court of Appeals appears at 441 F.2d 784 (1971) and is shown in Appendix I.

The memorandum opinion of the Honorable Trial Judge appears at 314 F. Supp. 1211 (1970) and is attached as Appendix E.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, Title 28, U. S. Code, Sec. 1254. This was a proceeding of an equitable nature to set aside an arbitrary capricious and inadequate ruling of the National Railroad Adjustment Board. Petitioner sought to have the matter remanded to that body for further proceedings according to law, or in the alternative for the District Court to make findings of the fact and award damages for wrongful discharge, upon finding that this Petitioner had never had a true ruling on the merits of the controversy by the Board. The case involves an interpretation of Section 153, Title 45, United States Code, same being an Act of Congress dated May 20, 1926, c. 347, Section 3, 44 Stat. 578, as amended by Act of Congress of June 21, 1934, c. 691, Section 3, 48 Stat. 1189. Petitioner contends that he requested a hearing, and requested that he be allowed to be present for a hearing, and that he was deprived of such a hearing; he further contends that he sought the advice of counsel, and was rebuffed, both by the Board and by the Union for seeking the advise of counsel; he further contends that later, after failing to secure the necessary orders to allow him to return to service under his labor contract, he requested that further proceedings be undertaken, and was never advised of the intention of the Union to abandon the case, or the fact that no further arbitration proceedings were being undertaken, or that

no suit would be filed, until less than a year prior to the institution of this suit, Petitioner's complaint in the trial court appears as an exhibit in the Appendix (Appendix H).

The Memorandum Opinion of the Honorable Trial Court dated June 17, 1970 (Appendix E) remanded this case to the Board with instruction to make a finding on the merits; the Court found the proceedings there to be arbitrary and discriminatory, and that the action of the Respondent was of a retaliatory nature, in recrimination for Petitioner having sought and obtained a judgment for injuries in the course of his employment under the Federal Employers Liability Act. The order of the District Judge was an interlocutory order but was appealed with permission under the provisions of Title 28 United States Code, Section 1292(b).

The Honorable Court of Appeals reversed and rendered said judgment of the Trial Court, by a judgment of April 26, 1971 and the Motion for Rehearing was denied May 27, 1971. Mandate has been stayed by the Court of Appeals until August 25, 1971. Notice of Appeal if required was filed in the Court of Appeals June 18, 1971.

QUESTIONS PRESENTED

(1) Whether this is an "action at law" within the meaning of Section 153(q) of the National Railway Labor Act;

(2) Whether this is an action authorized by Section 153(q) of the National Railway Labor Act;

(3) Whether an arbitrary and discriminatory ruling by the National Railroad Adjustment Board may be set aside for equitable reasons;

(4) Whether the District Court has authority to set aside an order of the National Railroad Adjustment Board when the record clearly shows that the arbitration procedure required by the statute and by the operating agreement was not followed;

(5) Whether a two year statute of limitations found in Section 153(q) of the Railway Labor Act applies, even though:

(a) The case is based upon equitable grounds and Petitioner did not have full knowledge of the fact that his case had been abandoned, and arbitration procedure completed, and no further action to be taken, until less than one year prior to the institution of this suit,

(b) And even though this is not an "action at law" based upon a "cause of action accruing" under the award of the Board;

(6) Whether Petitioner has been denied due process of law and a right to a hearing as contemplated by said statute and by the Constitution of the United States.

STATEMENT OF MATERIAL FACTS

The material facts are well stated by the District Court, except for the following:

(1) In the F.E.L.A. case the Respondent contended that Petitioner could return to work the date of the trial of his case, or any time he chose to do so;

(2) The company did not handle the claim for reinstatement as a medical matter.

(3) Although the company treated the claim for reinstatement or return to duty as a disciplinary matter, it did not follow any proceeding called for in disciplinary cases;

(4) After Gibson was accused of unethical conduct for seeking legal advise (Appendix Court of Appeals Page 248) he made a request in writing to his Lodge that legal proceedings be undertaken to implement the ruling of the Board in his favor, and he was never advised that the Union did not intend to proceed with this request (Page 249).

(5) This Petitioner never waived a hearing, and on the contrary he made three trips to the Headquarters of the National Railroad Adjustment Board in order to assure that he would be present at the hearing, and nevertheless he was denied a hearing. (Gibson's testimony Pages 240-241)

(6) There is nothing whatsoever in this record to show that Gibson either actively or passively waived a hearing.

(7) A movement was undertaken by the membership of L. D. Johnson's Union (the general chairman) to remove him from office for his failure to properly handle time limit claims, but this was hushed up and Gibson was excluded from the proceedings.

(8) Although labor members in their dissenting opinion make some reference to proceedings in the F.E.L.A. case, there is no indication whatsoever in this record that the various papers which Gibson supplied for use in his behalf were ever filed with the National Railroad Adjustment Board, or were actually brought to the attention of the Board as a whole when it undertook the consideration of this case. Although the full record is certified, after successive orders of Court, there is nothing in the record to show that these proceedings were fully or properly considered by the Board as a whole.

REASONS FOR GRANTING THE WRIT

In the case of *Vaca v. Sipes,* 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903, this Honorable Court had presented to it the argument that arbitration procedure under the Labor Management Relations Act was the employee's exclusive remedy in a wrongful discharge case, regardless of the nature of the default of the Union or the employer, and regardless of the bad faith employed in the arbitration of an individual grievance by management and labor, and regardless of the perfunctory handling of such a grievance by two industrial giants, one on the side of labor and the other on the side of management, in the dispostion of the rights of a single employee.

This Honorable Court rejected this argument, but throughout the handling of this particular case in the Courts below, a contention has been made that a different rule applies in the case of a railroad employee because his rights fall under a different statute.

This is one of the more important reasons why a Writ should be granted in this case—to outline the rights of an individual employee in a wrongful discharge case. There is no reason to be more restrictive of an employee's rights under Section 153 of Title 45, United States Code, than there is of the employee's right under Section 185(b), Title 29, United States Code. Indeed, the 1966 Amendment by Act of Congress would indicate that the Congress was of the view that these individuals in Railroad employment were entitled to a judicial review on legal or equitable grounds, even though the ruling of the Board might be final as to facts of the individual case. There is no reason to believe that the Congress intended for the Courts to be cut-off from any power to order the

Board to proceed with the fact finding process in appropriate cases.

With specific reference to Gibson's case, it should be noted that by the express language of the Memorandum Opinion of the District Judge, it is made to appear that Petitioner alleged and proved to the satisfaction of the Honorable District Judge:

(1) That the summary disposition of Petitioner's case by application of the rule of collateral estoppel was clearly arbitrary and capricious;

(2) That neither the employer (Respondent Missouri Pacific Railroad Company) nor the Board followed any recognized arbitration procedure called for in a disability case;

(3) Neither did they follow any recognized arbitration procedure prescribed for a discipline case;

(4) That there has never been any determination on the merits of Petitioner's claim to return to service by any tribunal, either administrative or judicial;

(5) That the application of the rule of collateral estoppel was arbitrary and clearly discriminatory as to Petitioner Gibson;

(6) That the Respondent Railroad Company discharged Petitioner Gibson "out of retribution" for his having maintained a F.E.L.A. suit;

(7) That the ruling of the Board is arbitrary and without basis in reason or fact.

These findings support the Petitioner's pleading that:

(1) The method by which the Petitioner's claim was handled "metes out punishment and vindicative treat-

ment in retaliation for Plaintiff seeking his just rights" under the Federal Employer's Liability Act;

(2) That the medical arbitration procedure was not followed;

(3) That the ruling by the Board was inadequate and incomplete.

By overruling Respondent's plea of the statute of limitation of two years which is found in Section 3(r) of 45 United States Code Section 153, the District Court likewise accepted the Petitioner's contention in his pleadings, supported by testimony and the records before that Court;

(1) That the Union and the employer continued to negotiate Petitioner's claim after his time for appeal had run;

(2) That Petitioner was prevented from having a hearing (and a timely review of his case) by:

(a) The perfunctory way in which the arbitration procedure was carried out;

(b) Stern reprimands both from the Union and the Board for seeking assistance of legal counsel;

(c) Bad faith concealment by the Union of its intent to drop Petitioner's case.

The result reached by the Trial Court can likewise be supported by Petitioner's contention that this is a suit to set aside a spurious, meaningless judgment of the National Railroad Adjustment Board on equitable grounds, in the nature of a Bill of Review (distinguishable from "an action at law to enforce an award"), the governing statute of limitation being the four year general Texas Statute (Appendix D).

Since the Honorable Court of Appeals did not disturb any finding favorable to the Petitioner, the question is presented as to whether the equitable powers of the District Court are cut-off in these cases, regardless of how flimsy or inadequate the action of the Board may have been, and regardless of the arbitrary and unlawful procedures which may have been followed to arrive at an arbitrary and discriminatory result.

The case cited for such a proposition does not support it. In the case cited, *Union Pacific Railway Company v. Price,* 360 U.S. 601, 79 Supreme Court 1351, 3 L.Ed2d 1460 (1959) the Petitioner *had already had a ruling on the merits of the controversy,* whereas Petitioner has never had one. Where Price was in Court contending that he had an option as to whether he would accept the Board ruling or sue in Court, Petitioner says he never had a ruling and that he wants to get one in Court or get an order remanding the Case to the Board. Nothing stated in the philosophy of the Price case would deny Petitioner the rights which were given him by the District Court. The result reached by the District Judge, and his Memorandum Opinion, accommodate completely with the assumed purpose of the 1934 Act, as set out in the Price Case Opinion. Honorable Justice Brennan pointed out that the Unions were willing to forego common law remedies in the Courts, in order to escape technical decisions based upon confusing rules of law. Yet Gibson's right to a fair hearing in this case has been blocked by just such a technical ruling on just such an obscure rule of law, with no concern whatsoever as to the true merits of his case.

The District Court has found that this ruling is discriminatory, and the case reaches this Honorable Court with that ruling unchallenged by the Court of Appeals.

When this obscure and confusing legal point (collateral estoppel) was raised, Gibson sought legal assistance whereupon he was rebuffed by his Union and by the Secretary of the Board. This engineer, therefore, with a lifetime career at stake, was compelled to suffer an arbitrary, discriminatory ruling, without the aid of an attorney, on this obscure legal point, by a tribunal which is notoriously ill-equipped to deal with such matters.

The fact that the Honorable Court of Appeals has now avoided a ruling on this important question by resorting to a non-applicable statute of limitation does not eliminate the due process question. Neither the carrier nor the Union notified Gibson that all efforts in his behalf had ceased. After having been rebuffed for seeking legal advise, Gibson asked the Union to file a suit. It was many months later, when he gained access to some union records, preparatory to filing a suit against the union itself, that he ascertained that the Union had no intention of helping him and had never had any, and was actually in fear of a multiple suit against itself for the misdeeds of its general chairman, L. D. Johnson, in the handling of these claims of this nature.

Gibson was entitled to notice that the Board had taken its final action. The Statute calls for it. He was entitled to Counsel. The denial of both in this case constituted a denial of due process.

It is one thing for a litigant knowingly to waive a right to counsel with full knowledge of his rights. It is quite another to tell him he has no right to counsel, and then to rule against him on a highly technical point, and then to deny him the knowldge that he has received the last effort (and the last ruling) in his case.

Under such circumstances, the Honorable Court of Appeals erred in reversing the favorable judgment of the District Court on the basis of the Statute of Limitation found in Section 153 "First" (q) Title 45 United States Code:

> "All actions at law *based upon the provisions of this section* shall be begun within two years from the time the cause of action *accrues under the award* of the division of the Adjustment Board, and not after." (emphasis added)

This Statute of Limitation is not applicable for the following reasons:

(1) To the extent that Petitioner seeks to set aside a void, arbitrary, meaningless ruling, which says the Petitioner is in the right, and the Respondent was wrong, and yet fails to implement it with any meaningful relief, this is an equitable proceeding governed by equitable principles.

(2) The cause of action asserted here did not "accrue under an award of the Board";

(3) To the extent that Petitioner's suit seeks review of the ruling of the Board as a void, inadequate and discriminatory ruling, incomplete on its face, followed by a request for an interpretation, and a request for further action by his Union, limitation could not destroy his rights until he had knowledge that his case was abandoned, and that he had the final word in the arbitration process, and was now free to employ an attorney to seek a review of the wreckage.

It may be a matter of interest to this Honorable Court to note a recent opinion by the Supreme Court of Texas on the matter of due process in collateral estoppel cases, the case being *Mrs. Lily Benson v. Wanda Petroleum*

Company, Page No. B-2473 of the Supreme Court of Texas Opinion dated May 12, 1971, Opinion not reported (Appendix M). In that case the Texas Supreme Court says:

> "Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial."

In the proceedings before the National Railroad Adjustment Board, Petitioner was neither a party nor had any control, and his rights were trampled upon at every step by both the Union and the employer. He requested a hearing and was left out entirely. Contrary to what may have been the facts in other cases presented to this Honorable Court, Gibson was vigorous in the assertion of his rights, and has never been willing to drop his fight at any point. It is a cynical twist of judicial logic that would turn this man out without a hearing, after his having sought diligently for a hearing, on the theory that he is barred by Statute of Limitation, when his very delay in filing suit in this Court was brought about by the thing he seeks to correct.

The District Court found a way to correct this inequity by remanding the case to the Adjustment Board.

That decision should be reinstated. The individual rights of an employee can not be adequately preserved under an arbitration procedure controlled by industrial giants of labor and management, who have no real concern for the small inset of individual grievances arising out of wrongful discharges, unlawful disciplinary proceedings, petty recriminations and injustices, unless the parties to these ar-

bitration proceedings will know that a District Court of the United States will have the power and the authority to see the employee will at least receive a fair hearing.

The fact that a Union Leader in testimony before a Congressional Committee may have said that he was willing for individual rights to be sacrificed does not make it constitutional to sacrifice them.

CONCLUSION

It is respectfully submitted that the District Court did not transgress in any way upon the authority or the jurisdiction of the National Railroad Adjustment Board. To this Petitioner, it seems that he did not go far enough, because the parties to the arbitration agreement had turned their back upon him, and really had refused him a fair hearing or any fair determination of the matters presented. This being the case, logically he should have had a right to proceed for damages for wrongful discharge, as he sought in his alternative pleadings in the District Court. Nevertheless, the District Court prudently and cautiously limited his action to the matter of remanding the case to the Adjustment Board for a factual determination which would be essential in order for that Board to rule properly on a case, or for the District Court to review the rulings of the Board.

Under the Statute, as it existed before the 1966 Amendment, the employee had no cause of action under an award of the Board which did not contain a money award. Whatever relief he could find in such cases had to be obtained under the equitable powers of the District Court. Such actions could not logically be barred by a Statute of Limitation which referred only to actions to "enforce an award" and to cause of action "accruing under an award."

It is respectfully submitted, therefore, that the Honorable Court of Civil Appeals erred in reversing the thoughtful and carefully rendered judgment of the District Court, and that the judgment of the Honorable Court of Appeals should be reversed and that of the District Court should be reinstated, or in the alternative, that this Petitioner should receive such other and further relief to which this Honorable Court may find him to be justly entitled, either in law or equity, general or special.

Respectfully submitted,

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By_____ By_____

Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 23rd day of July, 1971, to attorneys for respondent, as follows: Mr. James P. Simpson, 1507 Pacific Avenue, Room 900, Dallas, Texas 75201 and Mr. Charles S. Pipkin, P. O. Box 1632, Beaumont, Texas 77704.

_____

ERNEST L. SAMLE

_____

GILBERT T. ADAMS

APPENDICES A-N

APPENDIX A

45 U S C A § 153 (j) - (q) 48 Statute 1189
as amended June 21, 1934

NATIONAL RAILROAD ADJUSTMENT BOARD— ESTABLISHMENT; COMPOSITION; POWERS AND DUTIES; DIVISIONS; HEARINGS AND AWARDS

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(j) Parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to set with the division as a member

thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The mediation board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the cause for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

APPENDIX B

45 U S C A § 153 (q) and (r), as amended June 20, 1966, Public Law 89-456, §§1, 2, 80 Statute 208, 209; and amended April 23, 1970, Public Law 91-234 §§1-6, 84 Statute 199, 200

NATIONAL RAILROAD ADJUSTMENT BOARD—ESTABLISHMENT; COMPOSITION; POWERS AND DUTIES; DIVISIONS; HEARINGS AND AWARDS

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided— . . . .

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or re-

manded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

APPENDIX C

45 U S C A § 58,
April 22, 1908, c. 149, § 8, 35 Statute 66

DUTY OR LIABILITY OF COMMON CARRIERS AND RIGHTS OF EMPLOYEES UNDER OTHER ACTS NOT IMPAIRED

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

APPENDIX D

Texas Revised Civil Statutes Article 5529

ALL OTHER ACTIONS BARRED, WHEN

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

APPENDIX E

MEMORANDUM OPINION AND ORDER OF DISTRICT COURT,

Filed June 17, 1970, Published 314 F. Supp. 1211 (1970)

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This case arises out of a controversy that is nearly twenty years old. The plaintiff, J. L. Gibson, became an employee of the defendant, Missouri Pacific Railroad Company, in 1927, and held the position of locomotive engineer when, on December 5, 1950, he suffered personal injuries while in the course of his employment. This incident was the basis of a suit for damages pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51, et seq., which was filed in the District Court of Harris County, Texas, in December of 1952. Upon the trial of that case, Gibson recovered a judgment of $32,500.00, plus interest. There ensued a series of appeals culminating some five years later in a sustention of Gibson's claim by the United States Supreme Court. The judgment with accumulated interest was finally paid on March 17, 1958.

Subsequently, on July 1, 1958, Gibson requested that Missouri Pacific return him to work as a locomotive engineer, which request was refused. He then instituted a grievance proceeding in accordance with the Rules and Working Conditions Agreement which, pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §151, et seq., was in effect between Missouri Pacific and Gibson's union, the Brotherhood of Locomotive Engineers. Gibson claimed that he should be returned to service and paid for all time lost since July 1, 1958. As is customary in disputes of this nature, the case was at all times handled by union officials. Procedures for settlement of grievances "on the property" were exhausted to no avail, and, as provided for by the Act, the union submitted the unresolved dispute to the appropriate division of the National Railroad Adjustment Board.

At this point Missouri Pacific interposed the objection that the case was not timely filed according to the rules of the Board, and this question was severed from the basic controversy for determination by a Special Board of Adjustment. A referee was appointed to sit with the Special Board in order to break a deadlock between the union and carrier representatives, and the decision was that the dispute had not been timely filed. The effect of this determination under NRAB rules was to bar Gibson's claim for back pay not to deprive the Board of jurisdiction to determine whether the employee had been wrongfully denied a return to service.

The remaining portion of the dispute was then taken up by the First Division of the Board. It was required that another referee be appointed to cast a deciding vote. The Division found that the Railroad was wrong in termi-

nating Gibson's employment and should continue to carry him on the posted seniority lists, thus preserving his eligibility for retirement benefits. However, the Division declined to order a return to service. Referring to Gibson's FELA suit against Missouri Pacific, the award found that,

> "Claimant technically has not been discharged by the carrier but has been paid in advance what the court found to be due him for being permanently deprived of his work."

The position thus taken by the Division was that, having prosecuted to successful conclusion a claim of permanent disability, Gibson is now estopped to assert his ability to return to work for the same employer.

Subsequently, in April of 1965, Gibson filed suit in the District Court of Anderson County, Texas, against his union and L. D. Johnson, the union official who handled arbitration of this dispute, for damages resulting from alleged misfeasance in handling the claim. Summary judgment for defendants was affirmed by the Court of Civil Appeals *sub nom. Gibson v. Johnson,* 414 S.W.2d 235 (Tex. Civ. App.—Tyler 1967, writ ref'd. n.r.e.), which held that Gibson could not have prevailed on his claim before the NRAB because the record conclusively showed that he filed suit against his employer and had collected damages for total and permanent disability and was therefore estopped to assert a right to return to work. Since successful prosecution of the claim was impossible, the Court held, the union's conduct in presenting Gibson's "fruitless claim before the NRAB could not, as a matter of law, have been a causal factor in the adverse ruling." At 238.

Gibson has now brought this action under 45 U.S.C. §153(q), seeking to have this Court set aside the NRAB award. In his brief and through testimony offered at trial, plaintiff has indicted the union with misfeasance and nonfeasance in the handling of his grievance and dispute before the NRAB. Though the Union is not a party to this suit, plaintiff argues that this defendant cannot "hide behind the Union's wrongful failure to act." However that may be, it is clear that these are matters beyond the Court's concern inasmuch as the Court is only empowered under §153(q) to set aside an award of the NRAB on one of three grounds: for failure of the division to comply with requirements of the Act, for failure of the order to conform or confine itself to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division issuing the order. There is no evidence whatsoever to support a finding of fraud or corruption on the part of any member of the First Division in connection with this case. Nor is there any question raised as to the proper exercise of the Board's jurisdiction.

Basically what Gibson contends is that the Board has mishandled his claim. He contends that his case is essentially a disciplinary case in that it arose out of his claim that the Railroad has discharged him as punishment for prosecuting his FELA suit. The labor contract calls for two types of arbitration, disciplinary and medical. Gibson contends that this dispute was not handled according to either procedure. If it was a medical case, the Board could not arbitrarily, without prescribed medical arbitration, decide that Gibson was a disabled or unsafe employee. If it was a disciplinary case, then Gibson contends that the Board's finding that his employment rela-

tionship was improperly terminated by the Railroad entitles him to a decree implementing his right to return to work. Plaintiff argues that the Railroad has accomplished by this "improper" award what it could not do under federal law and the relevant labor contracts: punishment of an employee for pursuing his FELA claim against his employer.

The Railroad contends on the other hand that this is a simple case of an employee who offers proof to support one position on one occasion and seeks to contradict himself in making a second claim against the same adversary. The Court of Appeals has stated the rule in *Jones v. Central of Georgia Railway Co.*, 331 F.2d 649 (5th Cir. 1964):

> "* * * The Trial Court did conclude that when an employee alleges and successfully proves in such suit that he is permanently injured and disabled, rendering him unable in the future to perform the work of a switchman, or to do other manual labor, and is compensated for lost wages 'past, present and future' and the railroad company pays the full judgment pursuant to such a lawsuit, the railroad is not bound as a matter of law to retain the employee in its services with back pay. The Court grounded its decision on collateral estoppel. In our opinion the reasoning of the Trial Court is sound from a moral and legal point of view in the circumstances of this case. * * *" At 654-655.

Plaintiff seeks to escape the bar of the estoppel doctrine with two arguments. First, he contends that the Fifth Circuit has abandoned the doctrine by its opinion in *Hodges v. Atlantic Coast Line Railroad Co.*, 363 F.2d 534 (5th Cir. 1966). In that case the NRAB had ruled

that the railroad employer had breached its contract by discharging an employee as unfit for service without any investigation. As in our case, the railroad contended that the employee was estopped by reason of his successful FELA action based on allegations of total and permanent disability. The Board, however, rejected the estoppel argument on the ground that the employee was not a party to the proceedings before it; the claim was prosecuted in his behalf by the Union. On appeal, the District Court set aside the award, granting summary judgment for the railroad. The Court of Appeals reversed, holding that the award must stand and be enforced.

It is perfectly clear, however, that the Fifth Circuit's action was *not* predicated upon a rejection of *Jones* and the estoppel doctrine. The Court strongly indicated its disapproval of the Board's construction:

> "However, it cannot be denied that Hodges was the real party in interest who was to profit by a favorable decision even though not a party in name. . . . [T]he NRAB is not bound by common law rules." At 539

The reason for the Court's refusal to disturb the award under the rationale of *Jones* was the intervening decision of the Supreme Court in *Gunther v. San Diego Arizona Eastern R. Co.*, 382 U.S. 257 (1965), which held that a District Court may not *under any circumstances* review the Board's findings on the merits that an employee has been wrongfully removed from service. It was squarely held that the merits of the wrongful removal issue as decided by the Board *must be accepted* by the District Court. In this light, the Court of Appeals concluded in Hodges that, "notwithstanding former decisions of this

Court," it was precluded from determining the disability issue and, in turn, "the analogous estoppel argument." The Court went on to say in dictum:

> "Without passing on the issue of estoppel, we feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability, establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost. The NRAB asserts that it recognizes and applies estoppel in appropriate cases, and that it has no sympathy for an employee who, by taking inconsistent positions, undertakes to collect twice for the same claim." At. 539.

Thus it will be seen that far from supporting plaintiff's position, *Hodges* places him in an even more difficult posture, for by the rule of that case, and of *Gunther*, this Court must accept as final and binding the Board's decision on the wrongful removal issue, i.e., that Gibson loses by estoppel.

Plaintiff argues, however, that there is no basis in fact or law for application of estoppel in this case because Gibson realized only a limited recovery in his FELA suit "which would have no relevance to the amount recoverable for total and permanent disability." This contention is not without substance. The First Division had before it evidence that Gibson's earning capacity, amounting to $6,000.00 per year, as measured against a verdict of only $32,500.00, would indicate that the jury only awarded lost earnings over a period of about five years of his life. Furthermore, when it is considered that there was also a

claim for pain and suffering, past and future, the award would certainly not seem to reflect a determination of total and permanent disability. An interpretation of Gibson's award was issued by the First Division at the Union's request. The Referee's opinion stated as follows:

> "3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held."

The "testimony" referred to was obviously that adduced at Gibson's FELA trial, since none was taken in the NRAB proceedings.

The position thus taken by the First Division is that Gibson is bound by testimony offered at his trial to the effect that he was permanently disabled from railroad. But estoppel by judgment ordinarily extends only to matters actually litigated, not to what might have been litigated. *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). The judgment and verdict rendered in the state FELA case are in the certified record. Though the case was submitted on special issues, the jury was not asked whether plaintiff's injuries were total or permanent, and such was not a determination necessary under the trial court's instructions to a finding for the plaintiff. The jury was instructed that it could award damages for lost earnings, past and future, and for pain and suffering, past and future; but it has not required to itemize its verdict or explain how the total

verdict was to be apportioned among these. Under these circumstances, given the amount of the damages awarded, the verdict seems clearly ambiguous insofar as the nature and extent of Gibson's injuries is in issue. In applying the doctrine of estoppel in *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953), the Court stated in a footnote:

> "* * * We are not unmindful that in a situation of this type where a greater period of time has elapsed between an ambiguous judgment or settlement and an application for reinstatement, there may be a factual question as to whether the recovery enjoyed by the plaintiff was intended to compensate him for longer than the elapsed period. . . But the fact that the distinction which must be drawn is one of degree rather than of kind does not in any way lessen its force." At 513-14.

Furthermore, it should be noted that the FELA adopts the concept of comparative negligence, authorizing a jury to diminish a plaintiff's recovery in proportion to his own contributory negligence. 45 U.S.C. §53. Thus in a case where a plaintiff's recovery is substantially diminished in accordance with a jury's finding of contributory negligence, it plainly could not be that the damages awarded were intended as full compensation for lost earnings. In Gibson's case the jury actually found him guilty of contributory negligence (special issue number 15), though it found that the same was not a proximate cause of his injuries (special issue number 16). Though the Fifth Circuit has since held that there must be a causal relation to require diminution for negligence of the injured worker, *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir. 1965), the jury in Gibson's case was not so instructed.

The record reflects that the trial court admonished them to diminish plaintiff's damages proportionately to any negligence of plaintiff "causing or contributing to his injuries." It is not unimaginable that under these instructions the jury felt free to compare the negligence of the parties and to adjust their verdict as might seem to them appropriate.

It is a sound principle that an employee is estopped to assert a right to return to work after pursuing an FELA *claim in which* he holds out his inability to work and recovers a large sum of money in satisfaction of his claim; but when the recovery is nominal or unsubstantial, the jury's purpose may be ambiguous, or it may be clear as a matter of reason that compensation for serious, long-term injury was not contemplated. The doctrine of estoppel was not intended to bind a litigant to a position not successfully maintained. Under the construction of the estoppel doctrine endorsed by the First Division, an employee would in effect forfeit all rights under his labor contract by the filing of an FELA action against his employer. This would be so even though he might recover an unsubstantial judgment or, for strategic reasons, settle the claim for a lesser sum. The doctrine is intended to serve the dictate of public policy that there should be an end to litigation. It should not be employed in such a manner as to intimidate railroad employees who seek to exercise their rights under federal law. It is explicitly provided in 45 U.S.C. §59 that,

> "Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."

We think that under the facts of this case the First Division's summary disposition of Gibson's claim by application of the bar of estoppel was clearly arbitrary. The verdict of the jury rendered at Gibson's FELA trial is ambiguous on its face. Gibson has not received a medical examination for the benefit of this record in eighteen years. There is absolutely nothing in the record to justify a finding that this employee is permanently disabled from railroading.

The question remains whether this Court has jurisdiction to set aside this award when the Court of Appeals was of opinion in *Hodges* that it was foreclosed by the *Gunther* holding from compelling the Board to consider the estoppel issue. We think that we do have such jurisdiction. What the Supreme Court disapproved in *Gunther* was the holding of several lower courts that appeals of NRAB awards could under some circumstances take the form of trials de novo. In *Hodges* the Board had rejected the estoppel theory and decided the case *on the merits.* Such a decision by the rule of *Gunther* was binding upon the District Court. However, such is not our case. In the case at bar there has been no decision on the merits with respect to Gibson's claim that he had been wrongfully removed from service. There has been only summary disposition of the claim upon the theory that it is barred upon its face by estoppel.

If *Hodges* means that there can be no judicial review of an order of the Board grounded upon estoppel, then employees in Gibson's position may only submit their grievances to the Board assuming the risk that the panel of mediators which hears the case will choose to lower that conclusive bar upon their claims. In fact, the arbitrariness

of such administration is evident in a contrast of the First Division's disposition of Gibson's claim with that made of the employee's claim in *Hodges*, where the Board simply declined to apply estoppel. A controversy arising under labor contracts in effect pursuant to the Railway Labor Act or other labor legislation calls for an adjustment of the rights and interests of the parties in the light of relevant considerations of public policy. The Congress has for this reason provided for disposition of these disputes by a quasi-judicial body. The NRAB is charged by statute with the responsibility of adjusting the rights of the parties to a dispute within its jurisdiction; this Court has the responsibiilty to insure that this is done within the framework of the statute and of underlying public policy. We think that that policy is frustrated if we permit the Board to dispose of these disputes in such summary manner as was employed here. Gibson had a right to pursue his FELA remedies. He also had a right to enjoy the benefits and immunities of his labor contract. Congress did not intend that these rights should be mutually exclusive. For the Railroad to discharge Gibson out of retribution would be a clear contravention of federal law. We do not prejudge the merits of the controversy, we simply find that on this state of the record the First Division's determination that Gibson is permanently disabled from railroad is arbitrary and without basis in reason or fact.

When §513 of Title 45 was amended in 1966 to set out the present procedure for judicial review, Senate Report No. 1206, June 6, 1966, said of the bill:

> "The committee gave consideration to a proposal that the bill be amended to include as a ground for

> setting aside an award, 'arbitrariness or capriciousness' on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed to being arbitrary or capricious. This was done on the assumption that a federal court would have the power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power."

We hold that a District Court has jurisdiction to set aside an award of the National Railroad Adjustment Board which is clearly arbitrary as being without foundation in reason or fact, and upon that basis we set aside the award of the First Division and remand this cause to it with instruction to make new and appropriate findings as to the nature and extent of Gibson's present disability, if any, to work as a locomotive engineer and as to whether he has been wrongfully withheld from service in violation of the contract between the Union and the Railroad.

IT IS SO ORDERED.

ENTERED this 17th day of June, 1970.

s/ Joe J. Fisher
United States District Judge

ORDER AMENDING MEMORANDUM OPINION AND ORDER

(Number and title omitted) (Filed: July 10, 1970)

On this, the 10th day of July, 1970, the Court being of the opinion that the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause, is an appealable, final order, but it appearing to the Court that there may be a question as to whether same is an appealable order, and the defendant having orally moved the Court for the entry of an order permitting an interlocutory appeal from such order under the provisions of 28 U.S.C. §1292 (b), and it appearing to the Court that the said Memorandum Opinion and Order is an appealable order, upon reconsideration of the matter, and being fully advised in the premises, the Court, here and now, upon its own motion, amends the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause:

IT IS HEREBY ORDERED that the Court's Memorandum Opinion and Order are hereby amended to include the following paragraphs in addition to all paragraphs contained in the Memorandum Opinion and Order as originally filed:

The Court is of the opinion that the Memorandum Opinion and Order herein involves controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation; and being of the opinion that leave

should be granted for such an interlocutory appeal from such order:

IT IS, THEREFORE, FURTHER ORDERED that leave be, and the same is hereby granted unto the Defendant to appeal from such order in accordance with the provisions of 28 U.S.C. §1292(b), and no further proceedings will be had in this cause in this Court until such appeal shall have been terminated finally by the appellate court to which such appeal may be taken.

Thereupon, the Defendant, Missouri Pacific Railroad Company, upon being granted leave to take the interlocutory appeal, then and there in open Court duly gave notice of appeal to the United States Court of Appeals in and for the Fifth Circuit, which said notice is here and now entered of record.

ENTERED this 10th day of July, 1970.

s/ Joe J. Fisher
United States District Judge

APPENDIX F

Award 20369
Docket 37133

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois
With Referee Walter L. Gray

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)

STATEMENT OF CLAIM: "Request of Engineer Jay Lee Gibson that he be returned to service and paid for all time lost since July 1, 1958."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this Division has jurisdiction.

Hearing was waived.

The claimant, Jay Lee Gibson, an engineer for the carrier, was injured on December 5, 1950 on the property of the carrier. Subsequently suit was filed by the claimant against the carrier, under the Federal Employers' Liability Act for the sum of $80,000. Judgment was rendered in the lower Court of Harris County, Texas for the sum of $32,500. This was appealed to the Court of Appeals where the judgment of the lower Court was sustained. Thereafter the case was appealed to the Supreme Court of

Texas where the judgment was reversed. It was then appealed to the Supreme Court of the United States where the ruling of the Supreme Court of Texas was reversed and the judgment ordered paid.

Settlement was made for $32,500 plus $4,832.90 interest in full satisfaction of the judgment as rendered against the carrier.

Some four months later the claimant advised the company that he was ready to report for duty as soon as he could get all of his physical examinations and requested that he be given the right for the examinations.

This request was denied by the carrier on the theory that the engineer had disqualified himself for service as an engineer and that he was thereby considered to have severed his employment relationship with the carrier.

This matter was then appealed by the representatives of the Brotherhood who urged that Mr. Gibson be given such physical examinations. These requests were denied.

It was pointed out in the record, and it seems that there is no denial, that at the time of the filing of the appeal by Engineer Gibson for his physical examinations that his name with his seniority date had been posted on the seniority list continuously so it must be presumed that he is still being carried on the seniority list by the carrier.

This Division, acting with this Referee, in Award 20166 had before it a case of where a man had entered into a consent judgment and the claim was denied. After considering all the facts as set forth in the record and in the transcript of testimony in the lower Court we do not feel that the instant case has all the elements as were set forth in Award 20166.

This Division does not in any way, in this award, seek to set aside any awards as cited by either the carrier or the claimant. We feel that this case should be determined entirely on the facts and circumstances peculiar to this case only.

In the original complaint, as filed, this claimant had asked to be restored to service with pay for all time lost. This matter was disposed of by the Disputes Committee which held that the claimant was not entitled to back pay because of the time limits involved and stated that the only question to be determined by this Division was that of return to service.

Taking into consideration all the facts as developed in this case we do not feel that it was proper for the carrier to notify the claimant that his services had been terminated and his employment relationship severed since he was still on the posted seniority lists.

In support of this view this Division adopts that portion of Award 17452 by this Division which reads in part as follows: "Claimant technically has not been discharged by the carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

AWARD: Claim disposed of as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of FIRST DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1963.

EAK

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

AWARD 20369
Docket 37133

ORDER

TO: MISSOURI PACIFIC LINES - Gulf Coast
Mr. B. W. Smith, Chief Personnel Officer

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employee (or employees) the sum to which he is (or they are) entitled on or before November 30, 1963.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST E. A. KILLEEN
Executive Secretary

Dated at Chicago, Illinois
this 31st day of October, 1963.

EAK

APPENDIX G

Interpretation
Award 20369
Docket 37133

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago, Illinois 60603
With Referee Walter L. Gray

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)

The Brotherhood has asked for an interpretation of the award handed down on October 31, 1963, in this matter.

It is felt that a careful reading of the award is plain and unambiguous but in order that we may set forth with clarity the position of this Referee when the award was rendered, may we specify the following particulars:

1. The Disputes Committee had previously disposed of any question of back pay and therefore this question is not before us now nor was it before us when the award was rendered on October 31 as agreed by all parties.

2. Award 20369 was rendered on the same reasoning and logic of Award 17452 which reads in part:

> "Claimant technically has not been discharged by carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

Some question is raised in argument now that the omission of the sentence following this quotation from that award reading, "Consequently he is automatically on perpetual leave of absence" has some significance. It did not seem so to this Referee because it was the intention of Award 20369 that Jay Lee Gibson is entitled to all the benefits the same as if he were on a retired basis as an employee.

3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the posted seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held.

It is, therefore, the opinion of this Referee that the points as set forth above should clarify the question raised by the Brotherhood in its letter of December 16, 1963. If we should enter an interpretation coinciding with the Brotherhood's position set forth in that letter, we would in effect be changing the award or readjudicating the case, and it is felt, as stated, that the award is plain and unambiguous.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March, 1964.

DISSENT OF LABOR MEMBERS

The Referee denied the request for restoration to active service of claimant engineer, saying his decision is bottomed on the same reasoning and logic of Award No. 17452, which reads in part:

> " 'Claimant technically has not been discharged by carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work.' "

Then, he goes on to say (with reference to his Findings in Award No. 20369), ". . . but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held." Award No. 20369 (Docket No. 37133) contains no such holding in its Findings. The basis for the statement as made in the interpretation is thus found to be utterly non-existent in the source cited by the Referee.

In addition, it was contrary to the evidence before the Division. The Carrier controverted claimant's position with reference to the nature and extent of his injuries in the course of the suit for damages—the complete Transcript was available for the Referee; his attention was called to the fact. On the specific question of claimant's working ability, at time of trial and in the future, a Dr. Edward T. Smith was presented as an expert witness on Carrier's behalf. After testifying in some detail as to the nature and results of examinations he had made of claimant, Dr. Smith flatly stated, ". . . it would be the best thing for him to do, go back to work." Dr. William M. Palm, testifying as an expert witness for the Carrier, said some of claimant's alleged symptoms were exaggerated and others were im-

possible for him to have. When asked if, in his opinion, claimant could and should return to work, Dr. Palm, replied, "yes, sir." Carrier's expert medical witness, Dr. James Greenwood, testified at time of trial, some five years after date of injury, "I thought he could go back to work in thirty or sixty days." Finally, medical expert, Dr. H. V. Haverlah, for the Railroad, testified he had recommended claimant ". . . be permitted to return to work in Diesel engine service." A letter written by Dr. Haverlah on February 2, 1952, was introduced as evidence and in it he recommended claimant be returned to work.

The statement in Interpretation to Award No. 20369 (Docket No. 37133) is contrary to the evidence in the case and was not made in the Findings of Award No. 20369, as the Referee says.

This leaves as the basis for denying claimant's request for restoration to active service, the excerpted holding from Findings of Award No. 17452, that the man ". . . has been paid in advance what the court found to be due him for being permanently deprived of his work. . . ."

The Transcript of the Court proceedings disproves this, also. Claimant was just short of 49 years of age at the time of the trial and was shown to have a life expectancy of 25.21 years; he had been out of service virtually the entire period from December 5, 1950 (date of injury) to August, 1955 (the time of trial); his loss of pay approximated $30,800, and the jury awarded him $32,500, which was just about enough to reimburse him for that loss. At the end of the Transcript of the Court proceedings, were depositions from some of the jurors showing how they reached their verdict. All twelve jurors wrote down what they thought claimant should be awarded; the amounts were found to range from zero to substantial

sums; they were added up, divided by twelve, and this came out to $35,000. After some more haggling among themselves, the twelve jurors reached agreement on the sum of $32,500, and that became their verdict. We have pointed out above that claimant had already lost about $30,000 in earnings down to time of trial.

On these matters of evidence, Referee Gray premises his Findings that the verdict constituted ". . . what the Court found to be due him for being permanently deprived of his work. . . ." Less than $2,000 is taken by this Referee as adequate payment for the next 25.21 years of claimant's life.

The decision is rooted in error, is contrary to the evidence, and does violence to reason. The language in the Findings of Award No. 20369 (Docket No. 37133):

> "This Division does not in any way, in this award, seek to set aside any of the awards as cited by either the carrier or the claimant. We feel that this case should be determined entirely on the facts and circumstances peculiar to this case only.",

is surplusage. The author of them need not be apprehensive that Award No. 20369 (Docket No. 37133) could possibly be taken as having the effect of overturning the great weight of authority on this Division, which was cited to him (for example, see the Labor Members' Supporting Opinion to Award No. 19276), nor that it would be taken as controlling precedent in any subsequent similar case. This appears to be a graphic illustration of the device sometimes employed by referees who wish to follow personal leanings in deciding a case, knowing they are running counter to the evidence, the weight of authority and all semblance of logic. By incorporating language in their findings disclaiming any planned purpose

or intent to disregard prior awards, et cetera, they deny a valid claim, alleging their decision is justified by "the particular circumstances" of the case and extend a measure of comfort to those wronged by declaring their miscarriage should not be followed in future.

For obvious reasons, the author of Award No. 20369 (Docket No. 37133) need have little fear the mistakes will be taken as a basis for wronging other claimants in the future; we are confident it will be rejected if cited.

For these reasons, we dissent.

G. L. Buuck
Don A. Miller
K. Levin
B. W. Fern
W. R. Meyers

EAK

SUPPORTING OPINION OF CARRIER MEMBERS

Once more we have the dissenters contending that an employe of a railroad by some super-privileged status, not any more clearly reasoned than that, shall be permitted to offer proof that he is permanently incapable of performing work in one legal proceeding against an adversary and in a later proceeding against the same adversary assert that he has recovered and is capable of performing that very work.

This contention has been soundly denounced in every court decision of the identical fact framework in this railroad industry. They are:

Alcorn v. Missouri-Kansas-Texas R. Co. (D.C. Mo. 1950), 88 F.Supp. 471.
Buberl v. Southern Pacific Co. (D.C. Cal. 1950), 18 L.C. ¶65,925, 94 F.Supp. 11.

Wallace v. Southern Pacific Co. (D.C. Cal. 1951), 21 L.C. ¶66,882, 106 F. Supp. 742.
Pendleton v. Southern Pacific Co. (D.C. Cal. 1952), 21 L.C. ¶66,883.
Scarano v. Central R.R. Co. of New Jersey [Ruling Case Law] (D.C. Pa. 1952), 22 L.C. ¶67,213, 107 F.Supp. 662—aff'd (C.A.-3, 1953) 23 L.C. ¶67,540, 203 F.2d 510.
Sands v. Union Pacific R.R. Co. (D.C. Ore. 1956), 31 L.C. ¶70,437, 148 F.Supp. 422.
Lazaro V. Chavira v. Southern Pacific Co., 49 L.C. ¶16,970 (Sept., 1960).
Ellerd v. Southern Pacific R.R. Co. (D.C. Ill. 1961), 42 L.C. ¶16,824, 191 F. Supp. 716.
Jacksonville Terminal Co. v. Kirkland (Circuit Court, Duval County, Fla.), No. 60-2320-E; 1962.
New York Central R.R. Co. v. Robert Rials (D.C. Ill. 1962), Civil No. 5021.
Ezra Jones v. Central of Ga. Ry. Co. (D.C. Ga. 1963), Civil No. 8199.

The dissenters labor vaingloriously against this long line of judicial opinion by referring to some "authority on this Division". Such a quixotic attempt to throw "Awards" of this Agency against the force of law is surely tilting with windmills. Moreover the "awards" are self-contradictory for many hew to the rule of law.

This was a simple case of a demand for return to service, wholly inconsistent with an F.E.L.A. trial had on that very issue (See *Jay Lee Gibson v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, N.O.T.&M. Ry. Co.*, District Court of Harris County, Texas, 129th Judicial District, Court

* * *

I-20369

APPENDIX H

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION IN THE DISTRICT COURT

(Number and title omitted) (Filed: Dec. 9, 1968)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW J. L. Gibson, hereinafter called plaintiff, and complaining of the Missouri Pacific Railroad Company, and the National Railway Adjustment Board, hereinafter called defendants, for cause of action would respectfully show the Court the following:

1.

Plaintiff is a resident citizen of the State of Louisiana.

2.

The defendant, Missouri Pacific Railroad Company is duly incorporated under the laws and by virtue of the statutes of the State of Missouri and has an office and place of business at Union Terminal in Houston, Texas.

The defendant, National Railway Adjustment Board, is a quasi official statutory body which has heretofore been served with process.

3.

Plaintiff alleges that heretofore he was an employee of the Beaumont-Sour Lake and Western Railway Company, or in other words, Guy A. Thompson, Trustee, for the Beaumont-Sour Lake and Western Railway Company, which said company was in receivership, that thereafter, without a change of relationship, so far as this Plaintiff

was concerned, there was a re-organization of approximately 18 railroad companies and they were formed under the name of "Missouri Pacific Railroad Company" with headquarters at Kansas City, Missouri; said new company took over all of the business of said 18 railroad companies, including the said Guy Thompson, Trustee, for the Beaumont-Sour Lake and Western Railroad Company, and this Plaintiff thereby became an employee of the said Missouri Pacific Railroad Company; under the terms of said re-organization of said railroad companies into, and constituting, the Missouri Pacific Railroad Company, it was stipulated and agreed that said re-organization should not affect the rights, liabilities, benefits, or contractual obligation of any of said component companies, and said Missouri Pacific Railroad Company assumed, and took over, the obligations, if any, of the said Guy Thompson, Trustee, of the Beaumont-Sour Lake and Western Railroad Company, as well as the I & G Railroad Company, and various other companies constituting the Missouri Pacific Railroad Company.

Although, in 1950, and some intervening years, the Plaintiff was an employee of one of the component companies, he is and was, for all practical purposes, and for the purposes of this case, an employee of the Missouri Pacific Railroad Company.

4.

Plaintiff therefore names the Missouri Pacific Railroad Company as the Defendant in this cause, although some of the acts and events may have had their origin at a time when said Missouri Pacific Railroad Company was being operated under various different names and trusteeships.

5.

Venue and jurisdiction lie in this Honorable Court and in this division because:

(1) There is a complete diversity of citizenship, and more than $10,000.00, exclusive of interest and costs, in controversy, this Plaintiff being a citizen of the State of Louisiana, and the Defendant being a citizen of the State of Missouri, or in the alternative, of the state of Texas.

(2) The Defendant owns, operates and maintains an agent and an office within its control, and operates its railroad lines and rolling stock through Jefferson County, Texas, and in this division and in this district.

(3) This cause arises out of certain rights given to this Plaintiff by Statutes of the United States, and presents a Federal Question.

(4) In the alternative, this suit lies in this district and in this division by virtue of the provisions of Sec. 3, Chapters 691, Acts of June 21, 1934, and Sec. 3, Chapter 347, of the Acts of May 20, 1926, otherwise known as Subsection (p) of Sec. 153, Title 45, U.S.C.A.

6.

Heretofore, in 1950, Plaintiff received an injury in the course of his employment with said employer, and filed a claim therefor against said employer in the District Court of Harris County, Texas, under the provisions of Sec. 56, Title 45, U.S.C.A. and related Statutes, otherwise known as the Federal Employer's Liability Act, which said suit was tried to a conclusion and resulted in a verdict for this Plaintiff in the sum of approximately $32,000.00, which said suit was appealed by the Defendant

to various courts, including the Supreme Court of Texas; and various reversals and rulings occurred thereon, and said suit was finally appealed by this Plaintiff to the Supreme Court of the United States, and was remanded on one or more occasions with additional instruction, and finally, after a period of approximately eight years, the judgment was finally affirmed and paid off, with $4,000.00 in interest.

7.

Plaintiff's earnings at the time of said injury were more than $6,000.00 per year, and by the end of said eight year period of time, had this Plaintiff been able to work, would have exceeded $8,000.00 per year, and at this time, an engineer performing the work for which the Plaintiff was qualified, would earn $10,000.00 or more per year; Plaintiff alleges that said verdict and judgment of the District Court of Harris County, Texas, therefore compensated this Plaintiff for approximately six years loss of time or less.

8.

Plaintiff further states that he did not allege himself to be totally and permanently disabled in said suit, but merely claimed his right to compensation for such injuries, disability, and the extent and duration thereof as the evidence might show and as the jury and the Court might find.

9.

At a date after the final termination of said litigation, and the payment of said judgment, the Plaintiff, being hopeful that he might return to his former occupation as

a railroad engineer, secured the necessary physical examination, and obtained a certificate of his physical ability to perform the work of a railroad engineer, and presented himself for employment with his said employer, in accordance with the terms and provisions of a collective bargaining agreement which was then and there in force, and had been in force at all times, between said employer and this plaintiff's labor union.

10.

The defendant refused to assign this plaintiff work, as provided by the rules of said railroad, and also refused to provide for a physical examination or to otherwise in any way inquire into this plaintiff's physical ability and capacity to perform the work of a railroad engineer.

Plaintiff says that he made said application for assignment to work in the year 1958, and that negotiations for an assignment to work continued for a period of approximately six years thereafter.

11.

Plaintiff says that at all times during said period of time, and even down to this date, the date of the filing of this suit, the plaintiff has been a member, in good standing, of the Brotherhood of Locomotive Engineers, and as such was entitled to the benefits of said bargaining agreement, one of which said benefits calls for the assignment of engineers to runs in accordance with seniority, and in effect presents wrongful discharge. Plaintiff says that he was carried on the duty roster of said employer as an engineer available for service until some time after the filing of a claim with the National Railway Adjust-

ment Board by this plaintiff, and that said notation on the duty roster contained no limitation or other qualification; that after the point was made, thereafter, this plaintiff's name had been carried on the duty roster with a notation "disabled."

12.

Plaintiff says that no physical examination has ever been conducted to determine this plaintiff's ability to work and employment as a railroad engineer, other than the one which resulted in the certification of this plaintiff's ability to perform said work; and said railroad company has never at any time, in good faith, contended that this plaintiff was unable to perform the work of a railroad engineer.

13.

Plaintiff says, nevertheless, that because of this plaintiff's having filed his claim under the Federal Employer's Liability Act, to secure just compensation for such disability and injuries as he may have sustained in 1950, said employer has arbitrarily taken the position that this Plaintiff disqualified himself as an employee by filing suit for personal injuries against said employer notwithstanding the fact that the necessity for filing said suit was brought about by the wrongful acts of said Defendant itself, in refusing the plaintiff's just compensation for his injuries; and in denying this plaintiff reasonable and necessary medical care, either one or more of which made it necessary to institute said action under the Federal Statutes as this plaintiff had a full right to do.

14.

As a result of said train of events, a claim was eventually filed with the National Railway Adjustment Board by the Brotherhood of Locomotive Engineers in the name of this plaintiff, which said claim was retained by said National Railway Adjustment Board for several years and various rulings were made, none of which constituted a ruling upon plaintiff's entire claim, and the final determination of which was ambiguous, uncertain, and insubstantial. Additional requests for clarification of the orders and rulings of said National Railway Adjustment Board were answered with new or additional rulings or interpretations, but none of said rulings or interpretations carry or finally determine this plaintiff's right.

15.

Plaintiff says, nevertheless, that in the course of passing upon said complaint, at one state or another, the following rulings were made:

(1) That plaintiff's claim for back time was barred by his failure to file within six months after the rejection of his appeal by the Superintendent of said employer railroad;

(2) That plaintiff has not been discharged by his employer;

(3) That said employer had determined that plaintiff had been paid in advance for his work in the future in accordance with a judgment of the District Court of Harris County, Texas;

(4) That said ruling was without prejudice to this plaintiff's rights under said collective bargaining contract;

(5) Plaintiff has heretofore filed with this Honorable Court the ruling of October 31, 1963, as Exhibit A, and the ruling of March 18, 1964 as Exhibit B, and said exhibits are now on file with this Honorable Court attached to other pleadings, and will not be copied here.

(6) Exhibit B has already been filed with the other papers in this case for demonstrative purposes, and in such exhibit it is stated:

> "Some question is raised in argument now that the omission of the sentence following this quotation from that award reading 'consequently he is automatically on perpetual leave of absence' has some significance. It did not seem so to this referee because it was the intention of award 20369 that J. Lee Gibson is entitled to all the benefits the same as if he were on a retired basis as an employee."

Said interpretation also says:

> "It was the opinion of the referee the termination of claimant's employment relationship was not proper since his name was retained on the posted seniority lists."

Various other letters and correspondence followed, and this Plaintiff has continued to offer himself for employment, and also has made inquiries as to retirement benefits, but this Plaintiff has been denied any and all benefits, either by being given employment, or being given retirement benefits, and he has apparently, figuratively speaking, been sent into outer space, with said defendant carrying this Plaintiff as an employee, and posting him as an employee, and properly recognizing the seniority status

of this Plaintiff, but nevertheless refusing him employment or retirement benefits.

16.

Plaintiff says that no medical examinations were conducted, and no evidence was heard, relating to this Plaintiff's ability and capacity to perform the work of a railroad engineer, and the sole and only basis for any ruling adverse to this Plaintiff was the fact that he had obtained a judgment in the sum of approximately $32,000.00 in the District Court of Harris County, Texas, under the provisions of the Federal Employer's Liability Act, and has collected approximately $4,000.00 of interest on said judgment while the same was on appeal to various Courts, including the Supreme Court of the United States.

17.

Plaintiff says that said interpretation of said verdict and judgment, without other evidence, is arbitrary and unreasonable, and that the award, if any, of the National Railroad Adjustment Board is either void and unenforceable, or in the alternative, in the sense that the same holds that the Plaintiff has not been discharged, and that he remains an employee, the same entitles this Plaintiff to a return to service, notwithstanding the void and unreasonable interpretation that the Plaintiff "has not been discharged by the carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

18.

Plaintiff alleges that said interpretation of the facts, and the conduct of the Defendant railroad company is such

as to have the effect of depriving this Plaintiff of his rights under the Federal Employer's Liability Act, in that the same metes out punishment and vindictive treatment in retaliation for this Plaintiff seeking his just rights under said statute of the United States.

19.

In the alternative, Plaintiff says that the function and role of the National Railroad Adjustment Board was merely to determine this Plaintiff's status as an employee, and that it did determine that this Plaintiff was an employee of said employer, and that thereafter said employer failed and refused to return this Plaintiff to service, though he was shown to be physically qualified, and therefore, by inference, after a reasonable period of time in which to return this Plaintiff to service, and the failure of the Defendant railroad company to do so, this Plaintiff has, in effect, been wrongfully discharged, because, although Plaintiff is carried as an employee by said employer, and has been held to be such an employee, he has been denied employment in accordance with his seniority, and in accordance with the terms of said collective bargaining agreement under which he was entitled to a return to service.

20.

Plaintiff alleges that in the handling of his grievance the Brotherhood of Railroad Engineers turned the matter over to one L. D. Johnson, who was General Chairman of the Gulf Coast Division of said union, and that the said L. D. Johnson and other officers of said union, including the Grand Chief, represented to this plaintiff that his claim was being handled properly, and concealed from

the plaintiff the fact that a decision had been made to drop the plaintiff's grievance without arbitration or in any event, conceal from the plaintiff the fact that his claim had not been filed with the National Railway Adjustment Board, same being a board of arbitration, and thereafter purported to proceed to handle the case before the National Railway Adjustment Board by late filing, thus preventing the plaintiff from being able to bring his suit by direct suit against the defendant herein, and said grievance remained under consideration by the National Railway Adjustment Board for a number of years, and the said Johnson and other officers, agents and representatives of said union continued to conceal from this plaintiff the fact that his claim had been handled in bad faith by the said L. D. Johnson; plaintiff was excluded from all negotiations in regard to his grievance, and was threatened with discipline for employing an attorney, and it was not until January of 1965 that plaintiff's counsel was able to gain access to certain facts, records, correspondence, and memoranda, whereby he could discover that in all probability Johnson had actually determined to drop the plaintiff's grievance, and that it was only to avoid a suit against the union and the defendant herein that Johnson made a late filing of the plaintiff's claim before the National Railway Adjustment Board and purported to carry the thing through arbitration.

21.

Plaintiff would respectfully show the Court that said claim was handled in bad faith by L. D. Johnson, with the collusion, connivance and condonation of the defendant herein; that the defendant and Johnson continued to pretend to hold conferences with a view to the settle-

ment of this plaintiff's grievance, wherein he sought return to his employment, well beyond the time for the filing of an appeal to the National Railway Adjustment Board, and the said belated negotiations were participated in fully both by the defendant herein and by Johnson and the union, whereby plaintiff's rights were supposed to die from lack of appeal; that in the proceedings before the National Railway Adjustment Board the defendant and said union, and particularly the said L. D. Johnson, in some way, the exact nature and circumstances of which are unknown to this plaintiff, contrived to secure a ruling which appeared to be a ruling on the merits, of the plaintiff's grievance, and purported to grant this plaintiff a favorable ruling, and yet denied him any relief.

22.

Plaintiff says that the so-called award of the National Railway Adjustment Board was brought about by fraud and collusion between the said L. D. Johnson and the defendant herein. In this connection, plaintiff says that he was excluded from all negotiations, and therefore cannot give the correct names and titles of the officers and agents of the defendant who acted with the said L. D. Johnson, but plaintiff says that he specifically charges said collusion to have occurred between the said L. D. Johnson and those officers and agents of the defendant who participated in the handling of this plaintiff's grievance through the company grievance procedure and thereafter before the National Railway Adjustment Board.

23.

In the alternative, plaintiff says that said award was the result of intentional mishandling on the part of L. D.

Johnson, of which the defendant and its officers and agents who were handling said grievance must necessarily have had knowledge, and that the same was condoned by the defendant, its officers and agents, and that they actually participated in the protracted and pointless negotiations which occurred after the time for the filing of an appeal of this plaintiff's grievance to the National Railway Adjustment Board; that during the time when plaintiff's appeal should have been prepared and filed, the defendant herein dropped the plaintiff from the seniority list, and upon plaintiff having made protest thereof, the defendant placed the name of the plaintiff back on the seniority list in order to lull this plaintiff into a sense of false security and to cause this plaintiff to believe that his claim was being handled properly by the union, and thereafter continued to have negotiations on the plaintiff's claim long past the time for the filing of his appeal, and thereafter, with the connivance of Johnson, upon the filing of plaintiff's claim before the Board, the defendant herein urged a time limit rule as a defense.

24.

Plaintiff says that he did not discover the bad faith on the part of Johnson until less than two years prior to the filing of this suit, to-wit, in January, 1965.

25.

Plaintiff further alleges that thereafter he filed his suit against the Railroad Brotherhood for mishandling his case, and said Brotherhood moved for a summary judgment on the ground that the award of the National Railway Adjustment Board which it had procured in purportedly representing the plaintiff was the final and binding adjudication of this plaintiff's rights until the same should

be set aside in a direct suit against the defendant herein in this Honorable Court, and said motion was granted as a summary judgment which was appealed but became final approximately 18 months after the filing of this suit in this Court.

26.

Plaintiff alleges that between the time his grievance was denied by the highest company official allowed to pass on the same, and the time this grievance was filed with the National Railway Adjustment Board, the defendant changed his position and commenced to claim that the plaintiff was physically incapacitated, but nevertheless failed and refused to follow the customary and contractual procedure of medical arbitration on this point, and never ordered any physical examination of the plaintiff or took any other steps as provided by the contract to determine the physical ability of the plaintiff to perform his work, and has, since the proceedings, before the National Railway Adjustment Board, carried the plaintiff on the seniority roster, or duty roster as an employee, but has failed and refused to assign the plaintiff a run or to give this plaintiff any work.

27.

Plaintiff says that on repeated occasions he has reported for duty has contacted his union representative for an assignment to work, as is customary with the defendant railroad, and has also signed in for duty; in this connection plaintiff says that under the working agreement with the railroad, it is customary for an employee to notify his union representative that he is ready for duty, after which the union representative turns his name into the company's office, and his name is posted on the extra

board; that for most of the time both the union and the company have failed to place the plaintiff's name on the list of engineers ready for duty, even though the plaintiff has offered himself for duty, but that on one or more occasions his name has been placed on the list and he has signed in and designated his run, as is customary, in the railroading business, and on each such occasion, he has been bipassed, and has been told that he could not be placed on a run until the matter was cleared with the company attorneys.

28.

Plaintiff alleges that the circumstances recited herein constitute a wrongful discharge of this plaintiff, and he is entitled to his damages for loss of pay from July 6, 1968 to the date of this trial, together with a reinstatement to his job as a railroad engineer for the few remaining years until he attains retirement age, or so long as he may remain physically fit for the performance of the work in accordance with the rules and regulations applicable generally to employees of the defendant.

Pleading in the alternative, plaintiff says that the so-called award of the National Railway Adjustment Board and its *co*-called "interpretation" were void and meaningless because:

(a) Vague, ambiguous, inconsistent, incomplete, and facetious. In this connection plaintiff says that the award says that plaintiff is entitled to all of the rights of an employee; yet, at his age and under his service the only right which was available to him was that of operating a locomotive, because he had not reached his retirement age, and he could not get

a service letter, and he had not been physically declared unfit to operate a railroad locomotive, and in fact he was fit to operate one, and therefore the award purported to give them all the rights of a railroad employee, and yet failed to enter appropriate orders to protect those rights.

(b) Because the award was the result of bad faith on the part of L. D. Johnson and the union, or in the alternative on account of collusion between them and the officials of the defendant who participated in the handling of this plaintiff's grievance and the appeal thereof to the National Railway Adjustment Board.

Plaintiff says, therefore, that he is entitled to either have a determination of his rights by this Honorable Court after appropriate review of the facts, or he is entitled to have this matter remanded to the National Railway Adjustment Board for a determination of this plaintiff's physical ability and capacity to operate a railroad locomotive, and for reinstatement to service and compensation for his back in accordance with his contract with the defendant, with this Honorable Court retaining jurisdiction to enforce the plaintiff's rights upon an appropriate determination of the facts.

29.

In the alternative, plaintiff says that during the pendency of this suit, Section 1.53 of Title 45, United States Code has been amended effective June 20, 1966 which gives this Honorable Court authority in Section 1.53 (q) to set aside the award of the National Railway Adjustment Board in whole or in part and to remand a proceeding for further action; plaintiff says that his cause of action

for such review are those on June 20, 1966, and that his suit was filed within two years of that date, and in fact was pending on the effective date of the act, and that in this suit he sought review, of the award of the Adjustment Board, and therefore this suit is timely filed.

30.

In the alternative, plaintiff says that this suit is in effect a suit to review or set aside the judgment of the National Railway Adjustment Board on equitable grounds on account of the bad faith of the bargaining agent or the collusion of the defendant and its arbiters and agents therein, and that therefore this case is governed by the four-year statute of limitations of the State of Texas, and this suit is timely filed.

31.

In the alternative, plaintiff says that his suit is based upon a written contract between the defendant and his union, which he was required to agree to in writing during the handling of his grievance, and that therefore this case is governed by the four-year statute of limitation, and this suit is timely filed.

32.

In the alternative, plaintiff says that this is a suit for review and remand of an order of the National Railway Adjustment Board which was the result of fraud and bad faith on the part of the bargaining agent, which was discovered less than two years prior to the institution of this suit, and therefore this suit is timely filed. In this connection, plaintiff alleges that his cause of action could not arise for this relief until he had discovered the fraud

and that the same was not discovered until less than two years prior to institution of this suit.

33.

Plaintiff alleges that reference of the dispute to a "Special Board of Adjustment No. 390" constitution an unlawful delegation of authority.

34.

Plaintiff alleges that reference of said dispute to a "dispute committee" or "special board of adjustment" was not in accordance with law.

35.

Plaintiff further alleges, strictly as an alternative cause of action, that by virtue of the defendant carrying this plaintiff on the roster as an employee, and this plaintiff's repeated attempts to secure employment and to offer himself for employment his claim is a continuing one, not barred by time, and that therefore this suit is timely filed.

36.

In the alternative, plaintiff says that the National Railway Adjustment Board found all the facts in favor of this plaintiff, but nevertheless failed to provide this plaintiff with any relief; that said award, therefore, is incomplete, meaningless, and nugatory, that said award could not be complete without making some determination of this plaintiff's capacity and ability to operate as a railroad engineer; that neither the National Railway Adjustment Board nor this plaintiff's employer, the defendant herein, ever made any effort to determine the physical ability and capacity of this plaintiff for the performance of duties as a railroad engineer, either in accordance with the

contractual agreement governing this plaintiff's rights or otherwise; that if said award can be interpreted to be a finding of plaintiff's inability to operate a railroad locomotive, then and in that event the same is arbitrary and discriminatory, and not in accord with the treatment of brother employees in the same situation, and arbitrarily denies this plaintiff the rights to which he is entitled by law, and under the terms of the labor contract. In regard to any cause of action or claims for lost time or for reinstatement which may have arisen after the date of adjudication, if any, by the National Railway Adjustment Board, the plaintiff says that the same should be entertained and considered and decided by this Honorable Court as being ancillary and appropriately to be decided, along with the main issues of the case and that all of said matters fall within the appropriate ancillary jurisdiction of this Honorable Court.

37.

Plaintiff further alleges that, as shown by the rules of said agencies, the conduct of the parties, and the written agreements and other documents which are now on file with this Honorable Court, the time limit agreement only applied to lost wages, and not to the claim for reinstatement or for current employment status or current or future wages, plaintiff alleges that his cause of action arising out of the series of events hereinabove alleged, arose and accrued in a period of time of approximately January - April, 1965, whereupon plaintiff promptly filed a suit against the union and Johnson; and that just a little over a year later the plaintiff filed his suit in this Honorable Court during the pendency of said suit against the union, and that in all such things, the plaintiff acted with diligence.

38.

Plaintiff is entitled to recover his reasonable attorney's fees which he alleges to be the sum of Two Thousand, Five Hundred ($2,500.00) Dollars.

PREMISES CONSIDERED, plaintiff prays:

(1) That the award of the National Railway Adjustment Board be set aside and be declared void, and that this grievance be remanded to that Board for further proceedings according to law for the purpose of determining this plaintiff's rights both by lost time and for reinstatement, and specifically with regard to making a fact determination of plaintiff's physical ability to perform the work of a railroad engineer, as of July 6, 1958 and the intervening time including the date of such determination down to date, by actual investigation of the facts, as distinguished from some technical ruling. (In this connection plaintiff says that any finding or ruling, as a matter of law, that this plaintiff is estopped to claim that he is physically able to do the work of a railroad engineer is void and grossly erroneous, because he neither claimed that he was totally and permanently disabled nor did he receive compensation for total and permanent disability in his FELA suit, and there is neither a legal nor factual basis for such a holding, and therefore the same is void, arbitrary, and discriminatory, in the alternative, the same is the result of bad faith negotiations on the part of the bargaining representative with collusion on the part of the defendant herein.)

(2) That upon such factual determination, this Honorable Court shall enter appropriate orders giv-

ing this plaintiff judgment for his back pay and reinstatement to service.

(3) In the alternative, to set aside the award of the National Railway Adjustment Board as being void and arbitrary, unreasonable, and entirely unsupported by the facts, and constituting an erroneous interpretation of the law, with a remand to that body, directing it to proceed to determine this plaintiff's claim on the facts.

(4) In the alternative, to enter appropriate orders to give this plaintiff judgment for his back pay, together with reinstatement as a railroad engineer;

(5) In the alternative, to award this plaintiff his damages for wrongful discharge.

(6) That this plaintiff shall have his judgment for such other and further relief to which he may be justly entitled, either in law or equity, special or general, and for his costs of court and attorney's fees.

Respectfully submitted,

ERNEST L. SAMPLE,
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s/ Ernest L. Sample
Attorney for the Plaintiff

APPENDIX I

Reported 441 F.2d 784 (1971)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30522

J. L. GIBSON, *Plaintiff-Appellee,*

versus

MISSOURI PACIFIC RAILROAD COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of Texas

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(April 26, 1971)

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

MORGAN, Circuit Judge: This is an action seeking the review and setting aside of an award of the National Railroad Adjustment Board, First Division (hereafter, the NRAB); pursuant to Section 3 of the Railway Labor Act of 1926, c. 347, 44 Stat. 577, 45 U.S.C.A. §153, as amended (Supp. 1971), ordering the Missouri Pacific

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* Honorable Byron G. Skelton, U. S. Court of Claims, sitting by designation.

Railroad Company (hereinafter, the railroad) to reinsert appellee Gibson's name on its posted seniority list, but refusing to reinstate Gibson to active employment as a locomotive engineer. The district court held that it had jurisdiction to set aside an award of the NRAB which is clearly arbitrary as being without foundation in reason or fact, and upon that basis set the award aside and remanded with instructions to make new and appropriate findings. The railroad appeals. We reverse.

J. L. Gibson entered the employ of the railroad in 1927 and held the position of locomotive engineer when he was forced to leave the active service of the railroad. On December 5, 1950, he sustained a disabling back injury while in the course of his employment and subsequently recovered a judgment of $32,500 plus interest in a state action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C.A. §51, *et seq.* (1964). On July 1, 1958, Gibson requested reinstatement as a locomotive engineer claiming that his disability had abated. The railroad refused this request, taking the position that by claiming damages for permanent disability in his FELA suit, he was estopped for seeking reinstatement. Gibson thereafter instituted a grievance proceeding in accordance with the Rules and Working Conditions Agreement which was in effect between the railroad and Gibson's union, the Brotherhood of Locomotive Engineers, pursuant to the provisions of the Railway Labor Act, supra, 45 U.S.C.A. §151, *et seq.*, claiming that he should be returned to service and paid for all lost time since July 1, 1958, the date he applied for reinstatement. The Union and the railroad were unable to resolve the dispute through their established grievance procedure and, as a consequence, the Union submitted the dispute to the

NRAB. After a determination of a Special Board of Adjustment that the dispute had not been timely filed, but that only the claim for back pay was barred and the Board still had jurisdiction to determine whether Gibson had been wrongfully denied reinstatement, the First Division of the NRAB, sitting with a referee appointed to break a tie, issued the award here in question on October 31, 1963.[1]

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1. The award stated in part:

> Taking into consideration all the facts as developed in this case we do not feel that it was proper for the carrier to notify the claimant that his services had been terminated and his employment relationship severed since he was still on the posted seniority lists.
>
> In support of this view this Division adopts the position of Award 17452 by this division which reads in part as follows: "Claimant technically has not been discharged by the carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

An interpretation of the award, issued by the NRAB on March 18, 1964, stated:

> 2. Award 20369 was rendered on the same reasoning and logic of Award 17452 which reads in part:
>
> "Claimant technically has not been discharged by carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."
>
> Some question is raised in argument now that the omission of the sentence following this quotation from that award reading, "Consequently he is automatically on perpetual leave of absence" has some significance. It did not seem so to this Referee because it was the intention of Award 20369 that Jay Lee Gibson is entitled to all the benefits the same as if he were on a retired basis as an employee.
>
> 3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the posted seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held.

In April, 1965, Gibson filed an action in state court against L. D. Johnson, the union official who handled the arbitration of his dispute with the railroad, for damages resulting from alleged misfeasance in handling the claim. The Texas Court of Civil Appeals sitting at Tyler, Texas, affirmed the trial court's entry of summary judgment for the defendant, holding that Gibson could not have prevailed on his claim before the NRAB because he had filed suit against the railroad and collected damages for total and permanent disability under the FELA and was thereby estopped to assert a right to return to work and that the Union's conduct in presenting Gibson's "fruitless claim before the NRAB could not, as a matter of law, have been a causal factor in the adverse ruling". *Gibson v. Johnson,* Tex. Civ. App., 1967, 414 S.W.2d 235 (Writ ref'd., n.r.e.), cert. den. 390 U.S. 946.

The action now before us was commenced on June 1, 1966, some two years and seven months after the NRAB issued the award for which review is sought. We hold that Gibson's action is barred by the applicable statute of limitation and therefore find it unnecessary to consider the district court's holding on the merits.[2]

Prior to June 20, 1966, the Railway Labor Act provided no statutory right of review to an unsuccessful claimant before the NRAB. See Section 3, First (p) of the original Act as amended June 21, 1934, c. 691, §3, 48 Stat. 1189, 45 U.S.C.A. §153 (1954).[3]

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2. The defense of limitations was affirmatively pleaded by the railroad and preserved as a defense in the pretrial order. The district court, however, did not rule on the limitations issue.

3. Prior to June 20, 1966, Section 3, First (p) provided:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made,

On June 20th of that year, Section 3 was amended to provide a statutory method of review of unfavorable NRAB awards by way of a petition for review to an appropriate district court, which was given the power to set aside such an award "for failure of the division to comply with the requirements of the [Railway Labor Act], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order". Public L. 89-456, §1, 2, 80 Stat. 208, 209, 45 U.S.C.A. §153, First (q) (Supp. 1971).[4]

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may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

4. Section 3, First (q), as amended, now reads:

If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to

In both the pre-1966 and post-1966 versions of Section 3, any review by the district court is barred after two years. Section 3, First (q), as amended (1934), 45 U.S.C.A. §153, First (q) (1954) and Section 3, First (r), as amended, (1966), 45 U.S.C.A. §153, First (r) (Supp. 1971). The provisions are identical:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

This action would obviously be barred if it were brought pursuant to the 1966 amendments. However, the cause of action accrued long before the enactment of that amendment and the complaint was filed some 19 days prior to its effective date. As a result, even though the district court treated the action as a petition to review under the amended Section 3, First (q), this is not properly an action authorized by the Railway Labor Act. Nor can this be considered a suit for damages for wrongful dismissal since the prior submission to the NRAB of

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the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

a grievance as to the validity of a discharge from employment, as was done here, precludes the seeking of damages in a subsequent common law action. *Union Pacific Railroad Company v. Price,* 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed. 2d 1460 (1959). Instead, we can only conclude that this is an action to review an award claimed to result from a denial of due process of law. As was said by the Seventh Circuit prior to the 1966 amendment in *Ellerd v. Southern Pacific Railroad Co.,* 7 Cir., 1957, 241 F.2d 541, 544:

> . . . in the absence of any question as to the regularity of proceedings before the board, for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board. If that body has jurisdiction and proceeds according to constitutional guarantees, its decision is, in the words of the statute, final.

See *Union Pacific Railroad Company v. Price,* supra, 360 U.S. at 616; *Sigfred v. Pan American World Airways,* 5 Cir., 1956, 230 F.2d 13, cert. den. 351 U.S. 925.

Even though this action is one not specifically provided for by the pre-1966 Railway Labor Act, we feel that it is sufficiently "based upon the provisions of [Section 3]" of the Act as to be covered by the two-year statute of limitations provided in Section 3, First (q) of the 1934 Act. It is well established that "[t]he purpose of Congress is a dominant factor in determining meaning" in a statutory construction. *United States v. C.I.O.,* 335 U.S. 106, 112, 68 S.Ct. 1349, 92 L.Ed. 1856 (1948), particularly in interpreting "the meaning of a statute as applied to a situation which Congress did not foresee . . .". *Delany v. Moraitis,* 4 Cir., 1943, 136 F.2d 129, 132. Here Congress did not contemplate any review of awards of the

NRAB except as provided by Section 3, First (p) of the 1934 Act, but it did intend that such awards would be final and binding and subject to extremely limited review. As the Supreme Court has said:

> Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and the application of the provisions of collective bargaining agreements. *Union Pacific Railroad Company v. Price,* supra, 360 U.S. at 616.

While Congress did not contemplate nor did it provide for the species of action here before us prior to 1966, but which the courts found necessary to engraft upon the statutory scheme to insure constitutional fairness, this action is as much based on the provisions of Section 3 as the statutorily authorized action to enforce an award entered against an employer. Therefore, we conclude that while Congress did not foresee this extra-statutory mode of review, it was its intention that *all* methods of reviewing NRAB awards be barred unless "begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after". Cf. *Gordon v. Eastern Air Lines, Inc.,* W.D. Va., 1967, 268 F. Supp. 210.

In rendering this decision, it is important that we point out that we express no view on the district court's decision on the substantive issues presented by the case, as expressed in its thoughtful opinion of June 17, 1970.

The judgment of the district court is hereby reversed.

REVERSED.

APPENDIX J

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30522

D. C. Docket No. CA 5176

J. L. GIBSON, *Plaintiff-Appellee,*

versus

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

April 26, 1970

Issued as Mandate:

* Honorable Byron G. Skelton, U. S. Court of Claims, sitting by designation.

APPENDIX K

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 30522

J. L. GIBSON, *Plaintiff-Appellee,*

versus

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

(May 27, 1971)

ON PETITION FOR REHEARING

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

* Honorable Byron G. Skelton, U. S. Court of Claims, sitting by designation.

APPENDIX L

CONSTITUTION OF THE UNITED STATES AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX M

MRS. LILY BENSON, EXECUTRIX V. WANDA PETROLEUM COMPANY

SUPREME COURT # B-2473

The Texas Supreme Court Journal, May 12, 1971
Volume 14, Issue #31, Pages 358-360
(Not yet published in Official Reporter.)

The source of the problem here is a collision which occurred on October 29, 1967 in Eastland County, Texas, involving a tractor and trailer owned by Wanda Petroleum Company, respondent, and an automobile owned by Merrell Benson, now deceased, and his wife, Mrs. Lily Benson, which was being driven by Thurman C. Porter. A third party identified as Donald Chalk collided with the Benson vehicle following the initial collision. Separate suits for damages for personal injuries were filed against Wanda in the District Court of Eastland County by Mrs. Benson and by Mr. and Mrs. Porter. The suits were consolidated by the trial court and when called for trial Mrs. Benson took a voluntary nonsuit. The trial jury in the Porter suit found Wanda and its driver free of negligence and found Porter guilty of acts of negligence which proximately caused the collision. A take nothing judgment was entered in favor of Wanda.

This suit for damages for personal injuries suffered by her and by her deceased husband was subsequently filed by Mrs. Benson in the District Court of Harris County against Wanda and Chalk. The trial court severed the suit against Chalk and rendered summary judgment in

favor of Wanda upon the theory that the fact findings and judgment in the Porter suit were binding on Mrs. Benson. The Court of Civil Appeals affirmed in the stated opinion that the Bensons and Porters were engaged in a joint enterprise as a matter of law, and hence were in privity; and that the Bensons rested under a secondary or derivative liability which must have been considered and determined in the Porter suit. 460 S.W.2d 453. We disagree and so reverse and remand.

The rule of collateral estoppel, or as sometimes phrased, estoppel by judgment, bars relitigation in a subsequent action upon a different cause of action of fact issues actually litigated and essential to a prior judgment. It has been said that the rule rests upon equitable principles and upon the broad principles of justice. Cauble v. Cauble, 2 S.W.2d 967 (Tex. Civ. App., 1927, writ dism'd). The rule is generally stated as binding a party and those in privity with him. See Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S.W.2d 387 (1946); Cauble v. Cauble, supra; Evans v. McKay, 212 S.W. 680 (Tex. Civ. App. 1919, writ dism'd); Smith v. Wood, 115 Ga. App. 265, 154 S.E.2d 646 (1967); 46 Am. Jur. 2d, Judgments, Sec. 394 (1969). Section 83 of the Restatement of Judgments (1942) states that a person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is bound by the rules of res judicata. A comment to this section says in part: "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. . . . The statement that a person is bound

by . . . a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by . . . all or some of the rules of res judicata by way of merger, bar or collateral estoppel," It has been emphasized that privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts. Coleman v. Bosworth, 180 Iowa 975, 164 N.W. 238 (1917); Smith v. Wood, supra. Also, that privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. Hixson v. Kansas City, 361 Mo. 1211, 239 S.W.2d 341 (1951); 46 Am. Jur. 2d, Judgments, Sec. 532 (1969). But it is also recognized that there is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata and the determination of who are privies requires careful examination into the circumstances of each case as it arises. 50 C.J.S. Judgments, Sec. 788 (1947); 46 Am. Jur. 2d Judgments, Sec. 532 (1969). In Kirby Lumber Corp. v. Southern Lumber Co., supra, privity was defined as meaning the mutual or successive relationship to the same rights of property; and it was said that persons are privy to a judgment whose succession to the rights of property therein adjudicated are derived through or under one or the other of the parties to the action, and which rights accrued subsequent to the commencement of the action. It has also been said that the Restatement definition corresponds to results generally reached by the courts, the elements of which are summarized in these words: "[t]he word 'privy' includes those who control an action although not parties to it . . . ; those whose interests are

represented by a party to the action . . . ; successors in interests . . ." Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 856 (1952).

The rules of res judicata rest upon the policy of protecting a party from being twice vexed for the same cause, together with that of achieving judicial economy in precluding a party who has had a fair trial from relitigating the same issue. Bernhard v. Bank of America National Trust & Savings Assn., 19 Cal. 2d 807, 122 P.2d 892. (1942); and see Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Colum. L. Rev. 1457 (1968). Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial. As to the latter, Sec. 84 of the Restatement of Judgments (1942) states that a person who is not a party but who controls an action is bound by the adjudications of litigated matters as if he were a party where he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of law with reference to the same subject matter or transaction.

The rationale of decisions in other jurisdictions that have considered the problem at hand in the context of the employer-employee relationship is instructive. This is illustrated by Makariw v. Rinard, 336 F.2d 333 (3rd Cir. 1964). Rinard took his automobile to YBH Sales and Service, Inc. for servicing, and accompanied YBH's mechanic, Makariw, on a road test. While Makariw was driving the car hit a "pothole" and skidded into another car and an embankment. Makariw was killed and Rinard was injured. Rinard sued YBH for personal injuries and

contended that Makariw's negligence caused the accident. Judgment was in his favor based on findings of negligence against Makariw. Makariw's Administratrix thereafter brought a suit against Rinard under the Pennsylvania Wrongful Death and Survival acts. The federal district court granted Rinard's motion to dismiss the action on the grounds that any recovery would be barred by the prior finding in the Rinard suit that Makariw had been guilty of negligence, which was conclusive under the doctrine of collateral estoppel; it was reasoned that the derivative liability of the employer for the employee's negligence established the employee's privity with the employer and bound him to the previous fact findings. The court of appeals for the Third Circuit reversed for the stated reason that the legal representative of the employee had not had her day in court on the critical issues which premised her suit and was not bound by a final determination in the prior suit against the employer. Reliance was placed on decisions giving particular emphasis to considerations here present: the plaintiff in the later suit was neither a party to the former action nor in privity with any part in the sense that his rights were derived from one who was a party; and the cause of action always had been that of the present plaintiff who had no voice in the conduct of the prior suit, with no right to examine witnesses or to take other action to protect his interests. See Rice v. Ringsby Truck Lines, 302 F.2d 550 (7th Cir. 1962); Pesce v. Brecher, 302 Mass. 211, 19 N.E.2d 36 (1939); see also in accord, Adams v. Woodfin, 243 Ark. 348, 419 S.W.2d 796 (1967), and Shelly v. Gipson, 218 Tenn. 1, 400 S.W.2d 109 (1966). A like position was taken in Bolstad v. Egleson, 326 S.W.2d 506 (Tex. Civ. App. 1959, writ ref'd n.r.e.), without discussion.

The suit at bar is a separate and distinct action for redress for personal injuries. Mrs. Benson was not a party to the former action instituted by the Porters following her non-suit and they did not represent her in her claims against Wanda, respondent here. It was not shown that Mrs. Benson participated in, or exercised any control over, the trial in the Porter suit, or that she had any right to do so. She was not shown to have a beneficial interest in the recovery of damages for personal injuries on behalf of the Porters. In our view, the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata does not exist under these circumstances. Accordingly, we hold that the fact findings and judgment in the Porter suit do not bar Mrs. Benson, and that she is entitled to her day in court in prosecuting this action in her own right.

The judgments below are reversed and the cause is remanded for trial.

ZOLLIE STEAKLEY,
Associate Justice.

Opinion delivered May 12, 1971.

APPENDIX N

EXTRACT FROM GIBSON'S TESTIMONY GIVEN IN THIS CASE

A. Yes, sir.

Q. Attorney in Oklahoma?

A. Yes, sir.

Q. Without going into detail, was Mr. Moreland an acquaintance of yours from an earlier time?

A. Yes.

Q. He was a lawyer in a large firm up there in Oklahoma?

A. Yes, sir, Dunner, Stewart, Moreland, Campbell & Sanders.

Q. As a result of this, did Mr. Moreland write some letters for you?

A. Yes, sir.

Q. More or less to find out what was happening to your case?

(82) A. Yes.

Q. And to indicate that he was willing to help?

A. Yes, sir.

Q. I will ask you to state whether or not both you and Mr. Moreland, did both you and he receive communications from the Union? In regard to his intervention in this matter?

A. Yes, sir, they told me in a letter jointly . . .

MR. PIPKIN:

Your Honor, that is rank hearsay and I object.

THE COURT:

Objection sustained.

Q. Mr. Gibson, did you receive a communication from the National Railroad Adjustment Board, from Mr. McLeod?

A. Yes, sir.

Q. Just without repeating the details, may I ask you

this: Is it true or not that both the Board and the Union objected to you having an attorney?.

A. Yes.

Q. And were you accused of unethical conduct in employing an attorney

A. Yes, sir.

Q. All right, sir. Now, after this, did you feel, yourself, compelled to rely on the Union?

A. I had to comply with their rules and regulations until they were done and told me they were done with the case, because I had to go in that manner, I couldn't (83) have an attorney because if I did why I would be expelled from the Lodge.

Q. So, without going into detail as to each step in the arbitration proceeding, but after the Order of the Board, in October, 1963, and a later ruling or communication of March 18, 1964, where they said they weren't going to change anything—you remember?

A. Yes, sir.

Q. After that, did you make any other request of the Union to pursue this matter?

A. Yes. I made a written request to Lodge 755 and also talked personally to the Local Chairman, W. M. Jones, at that time, to start other proceedings to bring about the ruling that the Board had made.

Q. And did he tell you, at that time, that they would not file a suit?

A. He didn't say they would not file a suit, but he said they could.

Q. Did he ask to give him some time?

A. He said: "We will have to have a little time here to see what has to be done".

Q. Now, did you come back on several occasions in regard to the possibility of the Union pursuing the matter further in the form of a suit in court?

A. I did.

(84) Q. When did you come to a decision that they were not going to take any further action at all?

A. After I had went to Tulsa and had contacted Mr. Groves and found some papers but he let Mr. Moreland—he wouldn't let me have the papers but he let Mr. Moreland have the papers and he said they weren't going to have anything else to do with it, that he quit.

Q. When you examined those papers—in other words you found some indication that they decided to discontinue working on your case altogether?

A. Yes.

Q. Had they notified you when they made that decision?

A. No.

Q. Now, in regard to this information that was in the Union records, had you tried to get it before that time, had you asked to look at the papers?

A. I had asked to look every time I would see them.

Q. And was it through Mr. Moreland's help that you got into the papers?

A. It was through his way of contacting and talking and investigating is the way I got hold of the papers from Mr. Groves.

Q. Now, as a result of this investigation did you file a suit, later on?

A. Yes.

(85) Q. When did you file a suit

A. Sometime in 1965.

Q. In April, 1965?

A. Somewhere in that area.

Q. You filed suit against the Union?

A. Yes, sir.

Q. Now, Mr. Gibson, in connection with the handling of your grievance, I want to backtrack in connection with the handling of your grievance. Was there ever any investigation or hearing?